IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

JOHN ALBERT BOLTZ,

Plaintiff,

vs. Case No. CIV-06-587-F

JUSTIN JONES, et al.,

Defendants.

TRANSCRIPT OF MOTION FOR TEMPORARY RESTRAINING ORDER

BEFORE THE HONORABLE STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

JUNE 1, 2006

Tracy Washbourne, RMR, CRR
United States Court Reporter
U.S. Courthouse, 200 N.W. 4th St.
Oklahoma City, OK 73102 * 405.609.5505

APPEARANCES

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THE COURT: We're here in Civil 06-587, John Albert Boltz versus Justin Jones, and others, and specifically on the plaintiff's motion for a temporary restraining order and/or permanent injunction. Counsel will please give your appearances.

MR. HANKINS: James Hankins for Plaintiff John Boltz.

MR. DRAPER: Preston Draper and with me is Richard Mann, Assistant Attorney General.

THE COURT: Thank you. Give me just a moment, Counsel, to get organized.

MR. HANKINS: Judge, pursuant to our --

THE COURT: Excuse me, Counsel, just stand by. Now, Mr. Hankins, as you were about to say.

MR. HANKINS: Your Honor, pursuant to our conversation we had in chambers, I would ask the Court's permission for Ms. McCalmont to enter an appearance as amicus counsel in this case, if that's acceptable.

THE COURT: Amicus counsel, I'm not quite sure I understand that category. She can certainly -- as I mentioned in our brief conference with you and Mr. Draper in chambers, I certainly have no problem with Ms. McCalmont's entry of appearance as counsel to serve in whatever role as counsel, your co-counsel or second chair counsel you would want her to serve, and I will not require that the formality of the filing of an entry of appearance be accomplished today, but I'm going

to have to ask you to educate me just a bit as to what you mean by amicus counsel, if that's what you meant to say.

MR. HANKINS: That is what I meant to say, Your Honor. Amicus counsel representing the other plaintiffs similarly situated that raise the same underlying factual allegations as Mr. Boltz. I believe it is proper for her to enter an appearance in this case for the limited purpose of providing an overview to the Court concerning the merits of the litigation, the 1983 litigation.

THE COURT: Mr. Draper or Mr. Mann, do the defendants object to this request?

MR. DRAPER: Yes, Your Honor. I think she should appear as counsel for Mr. Boltz or not appear at this hearing.

THE COURT: Mr. Hankins, is it proposed that Mr. Anderson be permitted to participate in this case as an amicus represented by counsel, Ms. McCalmont?

MR. HANKINS: Correct.

THE COURT: Okay. Ms. McCalmont, do you on behalf of Mr. Anderson move to be heard on behalf of Mr. Anderson with Mr. Anderson as the amicus?

MS. McCALMONT: Yes, Your Honor.

THE COURT: Pardon me?

MS. McCALMONT: Yes, Your Honor.

THE COURT: I need counsel for the defendants at the lectern for just a moment.

Mr. Draper, obviously, this case is closely related in some important respects to the Anderson case, which has been pending in this Court for some time. Without precluding consideration by this judge today as to exactly what we will get into with any presentations by Ms. McCalmont on behalf of the amicus, Mr. Anderson, it strikes me that it would not be, under the circumstances, an extraordinary thing, at least, to afford Ms. McCalmont the opportunity to appear on behalf of Mr. Anderson as an amicus. Again, without foreclosing consideration of the extent to which these proceedings would be protracted by matters presented by Ms. McCalmont.

What says the state about that?

MR. DRAPER: Your Honor, I would still object to that. I believe that due to the unique circumstances of this particular case, where the state's position is that this case is not in fact similar to the case that is currently pending before the Court with Mr. Anderson at all, that we would still object because basically we're here on a motion for temporary restraining order for Mr. Boltz and not as to, you know, really the substance of the issue that if this Court granted the restraining order then maybe the motion to appear as amicus would be proper at that time. I don't think it's proper at this time, though.

THE COURT: Thank you.

MR. DRAPER: Thank you, Your Honor.

THE COURT: Ms. McCalmont, you represent Glen Anderson and Charles Taylor in Civil 05-825; is that correct?

MS. McCALMONT: Yes, Your Honor.

THE COURT: And is it on their behalf that you move for an order permitting them to appear in this case as amici and permitting you to appear as their counsel?

MS. McCALMONT: Yes, Your Honor.

THE COURT: That will be granted.

MS. McCALMONT: Thank you.

THE COURT: You may come forward. I want to inquire first, and perhaps logically this would involve inquiry first of counsel for the defendants, as I want to get some notion as to the areas of factual dispute in this matter. And, Mr. Mann or Mr. Draper, either one, you're invited to the lectern so that I may make inquiry as to the matters that are in dispute.

I can speculate as to what matters may be in dispute, but that obviously is not a good basis upon which to proceed. So let me cover a few points with you, Mr. Draper, and you can educate me as to the matters which from the defendant's perspective are in dispute.

And I have taken judicial notice, by the way, of some background in the case as reported at 806 P.2d 1117, Boltz v. State, the opinion of the Oklahoma Court of Criminal Appeals on direct appeal handed down on January 7, 1991. So I do have some understanding of the background of the matter.

It does appear, but I want you to set me straight if I'm incorrect, Mr. Draper, that the plaintiff is John Albert Boltz. He is a prisoner under a sentence of death imposed by the State of Oklahoma, he is in the custody of at least one of the defendants, and that the execution date is today. What is the appointed execution hour?

MR. DRAPER: The hour is six o'clock p.m., Your Honor.

THE COURT: Okay. Six o'clock today. The materials before the Court further indicate that the method by which the execution would be accomplished would be lethal injection consisting of the sequence described at the Department of Corrections website which consists of the sequential injection of sodium -- is it thiopental? Is that the correct pronunciation?

MR. DRAPER: I believe so, Your Honor.

THE COURT: Sodium thiopental, vecuronium bromide. Is that the right pronunciation?

MR. DRAPER: Yes, sir.

THE COURT: And potassium chloride, each of which is intended to have a different effect on the prisoner, but which collectively constitute the substances which are intravenously through two venal openings injected into the prisoner for the purpose of carrying out the sentence of death. Are we together so far?

MR. DRAPER: Yes, Your Honor.

THE COURT: Okay. And it's further asserted, now this is an assertion, and I'm not asking you to agree with the underlying substance of the assertion, but it's further asserted that the method of lethal injection proposed to be employed by the state carries a high risk of conscious suffering and pain by the condemned inmate, that the State of Oklahoma has deliberately ignored or is indifferent to the health and safety of the condemned prisoner in this respect in violation of the Eighth and Fourteenth Amendments to the Constitution, and that this is an arbitrary and capricious protocol which subjects the condemned inmate to -- or exposes him to avoidable pain and suffering all in violation of the Eighth and Fourteenth Amendments.

Without in any sense requesting that the defendants speaking through you to agree to the substance of that allegation, are we together that that is the essential allegation made on behalf of Mr. Boltz in this case?

MR. DRAPER: Yes, sir, I believe that's correct.

THE COURT: Very well. And is it also true that unless restrained, at six o'clock p.m. today, the Plaintiff John Albert Boltz will be subjected to the implementation of the sentence of death by lethal injection with the use of the protocol to which the Court has made reference?

MR. DRAPER: Yes, sir.

THE COURT: Okay. Bearing that in mind, then, Mr. Draper, aside from the obvious disagreement by the parties as to the substance of the matter in terms of the effect of the protocol on the plaintiff to which I just made reference, are you aware of any factual disputes in this case? We will talk about the law here in a few minutes, but are you aware -- and let me carve one more thing out of that.

There is a rather obvious issue under Nelson v. Campbell and the considerations discussed by the Supreme Court in Nelson v. Campbell as to whether we have had impermissible and intolerable delay in bringing this matter before the Court. So that aside, and aside from the question of the physiological effect of the implementation of the protocol, are you aware of any factual disputes in this matter?

MR. DRAPER: Well, let me clarify just a minute, Judge. I agree that those substances that you listed will be used to carry out the lethal injection, I agree that those substances are intended to do the specific physiological effects to bring about the death of the plaintiff, but I think there probably is some dispute as to the effectiveness of those drugs and the amounts that are used.

THE COURT: In my pending question to you, that's carved out, I recognize there is a dispute about what I'll call the physiological aspect of the case.

MR. DRAPER: Okay. I misunderstood your question

then, Your Honor, but, yes, we agree that those drugs will be used and that they are intended to bring about the death of the plaintiff.

THE COURT: Okay. And so, again, carving out two areas of factual controversy, number one, whether there has been undue delay in bringing this case, applying the principles set forth in Nelson v. Campbell and, number two, as to the physiological issues asserted by the plaintiff. Aside from those matters, does the state assert that there are any factual issues before the Court for resolution today?

MR. DRAPER: I don't believe so, Your Honor.

THE COURT: Okay. I do appreciate that clarification and that degree of candor.

Now, I will invite Mr. Hankins to the lectern for some inquiries as a preliminary matter.

Mr. Hankins, of course, as an experienced practitioner, and even aside from that, having read the state's well-written response in this case, and aside from that, having had the benefit of a brief discussion with the Court in chambers this morning with Mr. Draper also present, you're aware, certainly, of the decision of the United States Supreme Court in Nelson v. Campbell, 541 U.S. 637.

The most relevant part of that opinion, at least for present purposes, is the discussion of stay at pages 649 and 650. And I think at least for some purposes today, the

plaintiff's motion for a temporary restraining order -- and by the way, that's all that's before the Court today is a motion for a temporary restraining order -- the plaintiff's motion for temporary restraining order can for some purposes be equated to a motion for a stay. Which brings me to what I believe to be a passage from the Supreme Court's opinion in Nelson v. Campbell, which certainly does call for some discussion and consideration today.

That passage reads as follows, and I'm going to leave out internal quotations and citations, and on that basis this passage reads as follows: "A stay is an equitable remedy and equity must take into consideration the state's strong interest in proceeding with its judgment and attempts at manipulation. Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the state's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay."

That's from pages 649 and 650 of the Supreme Court's opinion in Nelson v. Campbell appearing at Volume 541 of the United States Reports.

Viewing the matter in light of that rather unequivocal language by the Supreme Court and in which the Court spoke unanimously, Mr. Hankins, and viewing the matter also in light of the fact that the state asserts that the matter you now seek to bring before the Court at the eleventh hour could have been litigated more than ten years ago, I need you to explain to the Court why these considerations as were fairly unequivocally articulated in Nelson v. Campbell should not be dispositive of your motion today.

MR. HANKINS: I believe three reasons, Your Honor. The first one is I don't believe any other death row inmate, as far as I'm aware, has ever been affirmatively denied counsel, compensated counsel to assist that inmate in pursuing a civil rights claim, a 1983 action, and I think that's a key distinction in this case. I mean, I'm basically here -- not basically, I am here in a pro bono capacity. I have represented Mr. Boltz since 1999 through specific appointment under a specific statute, 848(q), which has certain delineated limitations.

Some of those limitations state clemency, for example, are subject to sharp division even in the Court of Appeals. There's a Circuit split on that. Our Circuit allows it, compensated appointed counsel in state matters. It's an open question.

THE COURT: Was that the case from Judge Kerns'

court?

MR. HANKINS: Yes, Your Honor, the Hain case. And that was a non-bond decision from the Circuit. It is an unanswered question whether my portfolio as appointed counsel pursuant to the appointment covers not only payment for me, but experts, litigation support, the things necessary to prosecute an action, a civil rights action such as this that takes a lot of time and a lot of effort.

Over a month and a half ago I sought an answer to that question in this Court, not before Your Honor, but before a different judge, Judge Miles-LaGrange, who denied -- who handled the initial habeas action. And she informed me and I have attached a copy of the order that compensation or appointment of counsel in this action for Mr. Boltz is unauthorized under the statute and that is what is -- and that is the issue that I've appealed in the Circuit and that is -- and I know there's going to be discussion here of the Circuit opinion denying a stay pending that appeal. That is the only thing that appeal is concerning, the scope of the appointment of counsel to be compensated and to have expert and litigation support to prosecute cases such as this civil rights case.

THE COURT: Well, how long have you represented Mr. Boltz?

MR. HANKINS: Since 1999 in the initial federal habeas action, about seven years.

The second consideration, and I think this is a critical distinction from Nelson, is that I was aware of the Anderson and the Taylor case and Mr. Boltz was as well, so Mr. Boltz is affirmatively denied the help of a lawyer in formulating a federal civil rights claim. And also there is a pending claim by two other similarly situated inmates raising identical issues who are being represented by federally funded counsel in the federal public defender's office and that's Ms. McCalmont, she's present today.

And that litigation was began -- I believe began about a year ago. That was filed last July. And at that point there was nothing pressing. I mean, Boltz is sitting there without a lawyer. Other inmates are pursuing this. You know, could he have done something pro se? I'm sure he could have. Could I have maybe done something in a pro bono capacity? Of course, you can always do that. There's nothing prohibiting it.

But as far as the equities go, when you have district court saying that I'm unauthorized to do this or at least get paid and to get support to prosecute it in a professional manner and you have another case that is being prosecuted in a professional manner that has a scheduling order that is proceeding orderly and you don't have an execution date, I think it's entirely reasonable to -- well, not only that, and then you have the Hill case that's pending in the Supreme Court that's probably going to be decided later this month, that may

impact the whole thing. So there's a lot of uncertainties and there's some legal impediments to Boltz prosecuting this action.

And the other thing is the direct appeal was decided in 1999. Part of the --

THE COURT: I have a 1991 --

MR. HANKINS: I misspoke, Your Honor, it's 1991. Part of the factual basis for this claim, probably one of the key points of fact is the LaFevers execution and that occurred January 30th of 2001. So there is at least a progression of factual development that resulted in at least part of a reasonable delay here.

THE COURT: Well, so if we go back a little over five years, that was when the LaFevers execution took place, correct?

MR. HANKINS: Correct.

THE COURT: And you rely on that to some degree in support of your contentions as to the physiological effect of lethal injection?

MR. HANKINS: That's correct.

THE COURT: Well, as an aside, and at this point it certainly is an aside, was not the protocol revised in 2003?

MR. HANKINS: I think I can get an answer to that. Can I consult?

THE COURT: Well, no, that's neither here nor there

at the moment. But, anyway, at the time of the LaFevers execution, you represented Mr. Boltz?

MR. HANKINS: Correct.

THE COURT: And that was a little over five years ago?

MR. HANKINS: That's correct.

THE COURT: And obviously the prospects for ultimate relief from capital punishment in this case were becoming progressively more dim; is that fair?

MR. HANKINS: Yes, Your Honor.

THE COURT: So why were you not before this Court approximately four to five years ago?

MR. HANKINS: Well, I was really not aware of the specific factual nature to accumulate the facts to go forward with filing a complaint in this matter. You know, to draft and file a civil rights action attacking this procedure, it requires a very large amount of time and effort of investigating the facts. The appointment under the statute at that time was even more confined because, you know, basically my understanding and the cases was I'm to represent Mr. Boltz in federal habeas corpus actions only and appeals therefrom.

There was certainly no -- at that time I think there was clear authority that even state clemency was non-compensable. Other actions certainly like civil rights actions would clearly have been unauthorized.

I believe the Tenth Circuit's opinion in Hain opened the door a little bit as a more expansive reading of the statute of what the duties are, and that's one of the reasons why I filed a motion and requested authorization from Judge LaGrange. But it's not just something you just file. You have to have a good-faith basis and a feeling that there is merit to it.

And I believe the Anderson and the -- I believe at that point we -- and I say we, the defense community had developed enough of an evidentiary basis to go ahead and file the claim. And at that point it had been filed. So, like I said, you know, Mr. Boltz is sitting in prison without a lawyer to help him on this and there is -- the issue is being actively litigated at that point.

THE COURT: Thank you. Anything further on this point?

MR. HANKINS: No, Your Honor.

THE COURT: Okay. I'm going to hear now from counsel for the defendants on this preliminary issue of the application of the principles articulated as I have quoted them from Nelson v. Campbell. Mr. Draper.

MR. DRAPER: Yes, sir. Well, I would first note, as the Court has noted, that Mr. Hankins has been appointed in this case since 1999. That's seven years. A prisoner's civil rights claim does not -- is not bound up by the orderly procession of habeas cases. So Mr. Hankins was not -- did not

have to wait for his habeas cases to finish up before he could file a 1983 action, if he chose to do so.

We know that Mr. LaFevers' execution was in 2001. And to whatever extent that that gave counsel notice, that was five and a half years ago almost. We know that the action which you've allowed to come in as amicus today for Mr. Anderson, et al., was filed in July of 2005. That could have given notice.

Mr. Hankins sought permission for funding to be funded to file in 1983 in front of Judge Miles-LaGrange in April. He waited a couple of weeks after the -- after the date of execution had been given before making that motion. That motion was denied on April 28th.

THE COURT: Now, say that again. I'm not sure I understood that last point. Say that again, please.

MR. DRAPER: The Court of Criminal Appeals presented a date, an execution date on April 11th of this year. Mr. Hankins waited a week or so before asking to be appointed to do a 1983 action in front of Judge Miles-LaGrange.

Judge Miles-LaGrange --

THE COURT: So sometime in the neighborhood of the 18th to the 20th of April, or thereabouts, Mr. Hankins took that action which resulted in the filing of the case that was heard by Judge Miles-LaGrange; is that right?

MR. DRAPER: Yes, Your Honor.

THE COURT: Okay.

MR. DRAPER: And the state's position would be that the Supreme Court denying cert in Mr. Boltz's case occurred on March 27th of this year. The state filed a motion for setting an execution date that day and served Mr. Hankins, as counsel for the defendant, with that on March 27th. So he knew at least March 27th that this was coming.

After Judge Miles-LaGrange denied his request to be appointed to file a 1983, instead of immediately appealing to the Tenth Circuit, which he could have done, he waited until May 24th to appeal that action, nearly a month.

THE COURT: So cert was denied --

MR. DRAPER: Cert was denied March 27, 2006.

THE COURT: Okay.

MR. DRAPER: I'm sure this Court is aware that many, many, many prisoners file prisoner civil rights complaints pro se every day. There's nothing in the -- nothing that suggests that Mr. Boltz was incapable of filing a pro se civil rights complaint stating that he thought that lethal injection was somehow unconstitutional from the time that his conviction became final with the denial of cert in the Supreme Court in 1991 until today.

Mr. Hankins has actually filed an action pro bono. There's nothing that would have stopped Mr. Hankins from filing that pro bono on April 28th when he found out that he was not going to be appointed by Judge Miles-LaGrange to do that. And

in its order from the appeal of that denial, the Tenth Circuit basically said as much. Said that there has been nothing to stop Mr. Boltz from filing this action pro se or pro bono since he could have known about it, which certainly was more than two days ago. And the state's position is it's as much as 15 years ago.

And because of all of that, in light of the clear language of Nelson, which deals precisely with this issue, where we have a defendant who has an execution date set and in a dilatory manner files a very last-minute, eleventh hour as they call it, 1983 action to challenge the method of lethal injection, I suggest that Nelson absolutely controls in this situation.

It doesn't matter what the merits of a claim may be, the fact that you knew about it and are filing it within days of a set execution date makes it dilatory and makes it improper to grant any sort of equitable relief to a petitioner in that status.

THE COURT: Thank you. I'm going to make a determination as to the Nelson v. Campbell considerations only after we have addressed some other matters, because my consideration of those matters may in fact -- of the Nelson v. Campbell issue may in fact be influenced by other matters that are said here today. So that is very much a live issue. It may be dispositive, but it is not to be resolved quite yet.

I next want to hear from counsel, and I think logically

perhaps I should hear first from counsel for the defendants, as to the standard to be applied aside from -- and this is a rather significant carve out, if you will -- aside from the considerations expressed by the Supreme Court in Nelson v. Campbell.

I'm going to give you my preface and then I'll hear from you. I need to hear from counsel for the defendants and then from counsel for the plaintiff as to the standard which ought to govern today's application for a temporary restraining order. I'll give you my beginning point and then counsel will be invited to set me straight if it should appear that I'm headed in the wrong direction.

We do have a long line of Tenth Circuit cases which I believe trace back to an even older U.S. Supreme Court case that establish under certain circumstances what I will describe as a relaxed standard or a more lenient standard for provisional relief in some situations. Neither counsel for the plaintiff nor counsel for the defendant have cited to or quoted from the relevant authorities, but it's my duty to follow the law regardless of whether counsel cite the law to me that they might have cited.

But relying on a pretty good long line of Tenth Circuit cases, some of which are collected in Section 65.31 of Moore's Federal Practice, we have what appears to the Court to be a useful -- again, subject to the Nelson v. Campbell

considerations -- a useful context in which the standard for a grant of provisional relief ought to be discussed in this case.

The plaintiff is certainly required to show that he will suffer irreparable injury unless provisional relief is granted. He must show that the threatened injury outweighs whatever damage the proposed grant of provisional relief may cause the opposing party. He must show that the grant of provisional relief would not be adverse to the public interest. And subject, again, to the additional considerations I'm about to mention, he must show that there is a substantial likelihood that he will prevail on the merits.

However, from one perspective, here is the rub. If the moving party satisfies the first three elements, the standard for meeting the fourth requirement, namely, the likelihood of success on the merits, generally becomes more lenient. In such a case the party seeking provisional relief in the form of a temporary restraining order need only show that the issues are so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation. And that language goes back a good many years in both the TRO context and the preliminary injunction context.

I vividly recall a case in which a three-judge court in which the presiding judge was Judge Holloway, a three-judge district court in which the presiding Circuit judge, under the

then existing procedures was Judge Holloway, gave me an injunction seemingly only because of this more lenient standard, an injunction that was later reversed on the merits by the United States Supreme Court. So I was certainly just a bit concerned that neither side addressed the applicability of that noticeably more lenient standard.

The reason that it was of concern to me is that we do have -- and I do recognize that we cannot regard the protocol before the Court in this case as being the same that's applied in every state, but we do have a good many cases around the country in which challenges bearing some similarity to the challenge in this case are pending, all of which, subject to advocacy on the part of the lawyers in this case, tends to point in the direction of the presence of a serious, substantial, and difficult issue which may be a fair ground for litigation, which in turn satisfies what the Court of Appeals has articulated as being a more lenient approach to the Court's analysis of whether the fourth requirement for provisional relief has been satisfied.

Viewing the matter in that light, and again recognizing that Nelson v. Campbell is potentially an overriding -- it gives us potentially some overriding considerations. So carving that out for the moment, I will first invite counsel for the defendants to set me straight if it appears I'm headed in the wrong direction for reasons other than Nelson v.

Campbell as to the standard to be applied here today.

MR. DRAPER: Thank you, Your Honor. Let me directly address your question of why the state didn't address those things. It's because the state's position is that Nelson v. Campbell is a super standard and these particular cases where a 1983 action is brought at the last minute by a death row inmate.

The other law that you're talking about, I believe, is general law for equitable situations for whatever harm that any particular plaintiff claims to be facing. And for that reason, you know, the state focused on Nelson v. Campbell.

There's a second reason, and it's sort of a quasi law of the case reason in that basically this identical claim has been presented last week to the Tenth Circuit. I provided the Court with a copy of the Tenth Circuit's order in that case. And the Tenth Circuit, contrary to what Mr. Hankins suggested, did not stop at just the issue of the appeal for being appointed as counsel. But they went on recognizing the very late time that we have here with the looming execution date and said that looking at the merits of the 1983 case, acknowledging that they did not have the specifics of that case before them, that there was, "Boltz has not demonstrated a likelihood of success on the merits." And that's from page 8 of the Tenth Circuit's order of May 30th. And also that "there is the doubtful nature of the ultimate question Boltz would assertedly raise whether the

lethal injection procedure he faces is constitutionally impermissible." That's also from page 8 of that May 30th order.

In light of the Tenth Circuit's belief that this claim would likely not succeed on the merits, in light of the clear harm --

THE COURT: Now, I'm looking at page 6 of the amended order from the Tenth Circuit filed on May 30th and they talk about likelihood of success on the merits of the appeal that was before the Court in that case.

MR. DRAPER: Yes, sir.

THE COURT: Okay. And then they go on over on page 7 at the bottom of page 7 to say Boltz has not demonstrated a likelihood of success on the merits in part because of the highly speculative nature of the matter, which in the immediately preceding paragraph they somewhat pejoratively refer to as the postulated Section 1983 action yet to be filed, which tells me that at least to some degree the courts -- and then again at the end of the opinion they talk about a speculative and belated Section 1983 claim he now indicates he may file, all of which leads me to believe that although the belatedness issue is certainly there, to the extent that the Court relied upon "the highly speculative nature of the matter," they were making that point on the basis of their very correct observation that this postulated Section 1983 action

had not yet been filed. Am I reading that wrong?

MR. DRAPER: That the Tenth Circuit is making its order despite not having a 1983 action filed?

THE COURT: No. No. I read the Tenth Circuit's amended order as relying on two essential bases for its conclusion of a lack of likelihood of success on the merits. Number one, the belated nature of the action and, number two, the fact that the 1983 action was not yet even on file. So it was a postulated, as they call it, a postulated Section 1983 action yet to be filed, which in turn made it highly speculative.

MR. DRAPER: Yes, Your Honor. And I think I understand what you're saying, but I suggest that the other language which I read to you that they find -- they assume that Mr. Boltz is going to raise a claim that lethal injection is unconstitutional, knowing -- I mean, assuming that that is a claim he was going to raise, which we know for a fact is what he has raised.

The Tenth Circuit said that is a doubtful question whether lethal injection is constitutionally impermissible. And my position is that the Tenth Circuit said we're going to assume he's going to bring this case, we're going to assume that he's going to raise that question, knowing that question, that question is highly speculative, we don't believe that it really -- we believe that that question is doubtful in nature and that

he would -- there is no -- I can't remember -- a substantial likelihood that he's going to prevail on the merits. And so I would suggest that that should help to formulate this Court's consideration now that this Court does have Mr. Boltz's 1983 filing in front of it, but I would suggest --

THE COURT: Well, the Tenth Circuit -- does it not appear to you that the Tenth Circuit really didn't touch the underlying factual merits of the lethal injection challenge?

MR. DRAPER: No, that's right. They don't know what the underlying specific challenges Mr. Boltz brings are. Of course, I go back to this. I believe the Tenth Circuit believes that Nelson absolutely controls and that dilatory nature of this filing means that he does not get a stay, end of story. It doesn't matter what the other things are.

But Your Honor talked about the idea that there's a relaxed standard if you prove the other three. Well, I say that Mr. Boltz has in no way shown that the harm to him outweighs the harm to the opposing party, meaning the State of Oklahoma, or to the public interest, the entire populous of the state of Oklahoma.

The Tenth Circuit in its May 30, 2006, order on page 9 said it very well. It said that the harm that Boltz will face by being executed as scheduled is "counter-balanced by the state's interest in timely carrying out its final criminal judgments and the public's interest in a criminal justice

system that works as prescribed by its elected representatives without manipulative disruption by defendants raising eleventh hour claims. And it cites Nelson in its analysis of that statement. And the state's position is if there is ever a manipulation of the system with the dilatory filing, it's Mr. Boltz's.

He has had all sorts of notice. The state maintains that he could have filed a 1983 action 15 years ago. But earlier I walked the Court through different dates that also set off times to file his 1983 action. And when we look at his dilatory nature, I think that this Court has no choice but to deny the temporary restraining order.

THE COURT: Viewing the matter in that light, where are we -- and recognizing the narrowness of the request for relief and recognizing that the narrowness of that request for relief is intentional lest the request for relief be deemed a successive habeas petition.

MR. DRAPER: Yes, Your Honor.

THE COURT: Where are we if taking into account the showing which may be made the Court does not restrain execution but restrains execution using the challenged protocol?

MR. DRAPER: Well, on the statutes in Oklahoma, if lethal injection has been -- as the statute says, if lethal injection is found unconstitutional, then electrocution will be the means of execution, you know. I mean, I am not sure what

the -- I mean, I can tell you what the state's position will be.

THE COURT: Well, the protocol that's challenged in this case is not spelled out statutorily, is it?

MR. DRAPER: I believe that it's -- I believe the protocol itself is developed by DOC through DOC policy. The overriding idea of how lethal injection should occur is in the statute.

THE COURT: Lethal injection per se is a statutory method.

MR. DRAPER: Yes.

THE COURT: And it is the preferred statutory method.

MR. DRAPER: Yes.

THE COURT: But it's my understanding that the statute does not, beyond that, spell out the protocol to be used. Is that correct?

MR. DRAPER: And I'm sorry, Your Honor, I can't --

MR. MANN: That's correct, Your Honor.

THE COURT: Mr. Hankins, is there any dispute about that?

MR. HANKINS: No, Your Honor.

THE COURT: Okay. So where are we then if I grant plaintiff relief totally congruent with the relief sought in the complaint and that is temporary restraint of use of the

challenged protocol without restraining execution?

MR. DRAPER: The state would seek to have that order overturned by the Tenth Circuit and the Supreme Court, if necessary.

THE COURT: So that's your way of saying you would object to that?

MR. DRAPER: Yes, Your Honor.

THE COURT: Okay. Anything further from the state on the issue of the standard to be applied?

MR. DRAPER: I don't believe so, Your Honor.

THE COURT: Okay. I'll hear from the plaintiff on the issue of the standard to be applied.

MR. HANKINS: Your Honor, if I may, counsel for the state also brought up the dilatory issue as well. I do have a couple of other items to add to that if the Court would hear that.

THE COURT: Very well.

MR. HANKINS: First one is the protocol and this has been acknowledged by the Court just now and by the Court of Criminal Appeals very recently in the Murphy case, which I think was decided just last year. It's not statutory. It's whatever DOC says. And it's not really known to litigants who want to challenge it.

The notice, the current protocol, and I've attached a copy of Warden Mullin -- Mike Mullin, he was the warden at Oklahoma

State Penitentiary. He effected an affidavit January 12, 2004, in a separate litigation that outlines the protocol, and it is different in material aspects from what is posted on the DOC website. It is different and detailed. And Ms. McCalmont, amicus counsel, is much more learned in that area than I am.

But as far as notice of filing the claim in dilatory action, Mr. Boltz had access to the specific detailed protocol. I mean, talking about the amounts of the drugs, things of that nature, that aren't spelled out anywhere, neither in the statute nor in the DOC rules and regulations or on their website. And I've attached -- that's in the record here.

The second thing is administrative relief. Mr. Boltz --

THE COURT: Before you move on to that, I have reviewed the affidavit of Mr. Mullin. He refers to the same three chemicals. There is a difference in that the website version talks about the sequential injection of sodium thiopental and then vecuronium bromide and then potassium chloride, whereas paragraph 13 of Mr. Mullin's affidavit has to some degree a variation. He refers to sodium thiopental first in the left arm, then vecuronium bromide in the right arm, and then potassium chloride in the left arm and then potassium chloride again in the right arm and then sodium thiopental in the left arm and vecuronium bromide in the right arm.

So that's a bit of an elaboration or, if you will, a

variation from the protocol that appears at the website. Is that the difference that you're making reference to?

MR. HANKINS: That's one of them, Your Honor. And as far as I know, Oklahoma is the only state in the country that does it that way. And that's part of the problem we're alleging.

THE COURT: So there's one, two, three, four, five, six steps according to Mr. Mullin's affidavit?

MR. HANKINS: Correct. And I believe the weights, the specific amounts of the drugs are not contained anywhere either in published cases, state statutes, or Department of Corrections websites either.

THE COURT: What's the other difference then?

MR. HANKINS: The other difference between?

THE COURT: Between the website protocol versus the protocol described in paragraph 13 of Mr. Mullin's affidavit.

MR. HANKINS: I believe there are some. I don't know them. Ms. McCalmont can inform the Court on that.

THE COURT: Okay. Back to the subject immediately at hand and that is the standard to be applied.

MR. HANKINS: Your Honor, I can take some solace in the fact that I think the Tenth Circuit missed that standard as well in their order of May 30th and that's kind of what I took my cue from as far as standards. The case I cited in my papers is the Wyandotte Nation, the syllabus case that sets out the

standard and that was a most recent published authority from the Circuit and that was filed April 7th of this year.

If there is authority for a more relaxed standard, obviously, I have not provided cases to the Court containing that standard and clearly I believe I would advocate the Court apply a less rigorous standard as provided by law.

One thing, on page 8 of the Tenth Circuit's order -- and I'm referring to the amended order denying stay of execution filed May 30, 2006. In the second paragraph of the second sentence, the Circuit states we do not know exactly what the content of --

THE COURT: Excuse me. What page are you on?

MR. HANKINS: Page 8, Your Honor.

THE COURT: Okay.

MR. HANKINS: The first full paragraph, second sentence. And that kind of reaffirms, I believe, the discussion that the Court had with counsel for the state when the Circuit says we do not know exactly what the content of the thus far only broadly posited Section 1983 case might be.

And the distinction, Your Honor, is this proceeding is -- or at least one of the components is fact intensive. The Circuit -- I did not present them with all of the factual materials that I had that are present in this Court, nor some of the factual material that the Court is -- of which the Court is aware that I'm not even aware that has been presented

through the discovery process in the Anderson and Taylor cases, some of which is under seal or subject to protective order and not available to Mr. Boltz.

So to the extent that a more relaxed standard applies, and the Circuit didn't apply it, I think that's another reason for this Court to take this order from the Circuit with a grain of salt if the Circuit misapplied the standard, not to mention the fact that it's completely --

THE COURT: Well, that falls on pretty deaf ears when you're asking me to take an order from the Court of Appeals with a grain of salt.

MR. HANKINS: Well, the main point of that is --

THE COURT: Now, you can distinguish it, if you'd like, but don't ask me to take it with a grain of salt.

MR. HANKINS: Well, I only say that because the issue is completely different in my opinion and I would ask the Court to treat the issue addressed by the Circuit as a stay of the specific issue of construction of the federal statute concerning funding of appointed lawyers. That's the question that was before the Circuit, that's the issue I raised in my moving papers, and that's the issue they addressed. So rather not taking it with a grain of salt, I would ask the Court not give it persuasive authority in this case in this hearing.

THE COURT: Thank you. Counsel certainly must have guidance from the Court as to the standard which will be

applied by the Court in determining the motion that is before the Court today, which I have said and will emphasize is only a motion for a temporary restraining order. There are weighty considerations on both sides. There are good arguments as to why the U.S. Supreme Court's decision in Nelson v. Campbell should be dispositive today.

There are also good arguments which interlock with the Nelson v. Campbell considerations as to whether or not the Court ought to apply the more conventional and more lenient standard which has been articulated in a good many Tenth Circuit cases as I have described them.

And I won't repeat the conventional provisional relief test. It's familiar to all counsel. The relaxed version of that test, as I have said, applies where absent the application of the principles set forth by the Supreme Court in Nelson v. Campbell, the movant shows that the issues are so serious, substantial, difficult, and doubtful as to make them fair ground for litigation. That's easier to say perhaps than to apply.

We have a relatively recent elaboration on that standard in the Tenth Circuit's decision in the Star Fuel Marts case, 362 F.3d 639, at page 653, where the Court said, and I quote, "The Tenth Circuit has adopted the Second Circuit's liberal definition of probability of success. Accordingly, where the moving party has established that the three harm factors tip

decidedly in its favor, the probability of success requirement is relaxed. In such cases the movant need only show questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation."

That echoes similar language as to fair ground for litigation in the case of Resolution Trust Corporation v. Cruse, 972 F.2d 1195, at page 1199, a Tenth Circuit decision from 1992.

In Nelson v. Campbell, the Supreme Court had before it the petitioner's request for a temporary stay of execution which had been recharacterized by the petitioner as a request for a preliminary injunction as discussed on page 647 of Volume 541 of the United States Reports.

In that case the petitioner was likewise challenging the method of implementation of lethal injection and specifically he was challenging the proposed use of the cut-down procedure of getting access to his veins which were compromised because of his very substantial drug use.

The Supreme Court articulated the very powerful concerns and the resulting equitable test which the Court should apply in the passage on pages 649 and 650 from which I read earlier. The result of which is that this Court must certainly consider the possibility of last-minute manipulation by the plaintiff in bringing this action at this date and must consider that as being -- as representing a significant counter-veiling

consideration counseling against the grant of provisional relief in this case.

The effect of the application of the Nelson v. Campbell standards in this case is, I believe, a close question. I have reputable counsel before me who has given me some reasons that I do not dismiss out of hand for the delay in bringing this action. It is a fact that there has been and to this day is not a provision in place for this plaintiff to obtain effective assistance of counsel at least on a compensated basis.

It is also a fact -- and this does have a significant bearing on my consideration of the matter. It is also a fact that the development of the factual and legal basis for the present challenge to the lethal injection protocol is indeed a relatively recent development. There may be one or two cases that go back a few years, but overall this is a relatively recent development. It is not a matter that I could with a straight face say should have been raised on the basis of existing factual and legal development ten to 15 years ago.

The state does complain most emphatically, not exclusively, but most emphatically of the delay since certiorari was denied in this case on March 27, 2006, by the United States Supreme Court. Measured against that standard and viewing it in that light as a matter involving delay from late March until late May, the delay is not as egregious as it might otherwise seem to be.

There is also perhaps a potential issue as to ripeness where the challenge is mounted before an execution date is set. And I certainly don't address that issue on its merits, but that is potentially a consideration that could have a bearing on the reasoning of counsel.

I do apply the Nelson v. Campbell considerations. They are very unequivocally stated by the Supreme Court. I do note, however, that the Supreme Court, although speaking emphatically in Nelson v. Campbell, did not speak categorically. Seldom can any court speak categorically where the issues before the Court require, as they do here, traditional equitable balancing.

And the Supreme Court begins its key passage in Nelson v. Campbell with a statement that a stay is an equitable remedy. It is clear that we are notwithstanding the emphatic statement by the Supreme Court in Nelson v. Campbell, nevertheless, in an equitable balancing context, although with powerful considerations applicable that are not commonly applicable in other contexts. So I do apply and I do not disregard the Nelson v. Campbell considerations.

In applying the Nelson v. Campbell considerations and reconciling those considerations to the maximum extent possible with the traditional four-element test with the relaxed final element if the issues are so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation, it is my conclusion that the Nelson v. Campbell holding and the

test articulated in Nelson v. Campbell, does not require denial out of hand of the relief sought by this plaintiff today.

Those considerations remain very much alive and those considerations may yet have an impact on the Court's action today. But it is my conclusion they do not require out of hand denial of the relief sought by this plaintiff today and that the fundamental standard to be applied by the Court, not free of influence by the considerations set forth in Nelson v. Campbell, to be sure, is the more lenient standard to which the Court has already made reference.

Viewing the matter in that light, I will now invite Mr. Hankins to the lectern to advise the Court as to what evidence, if any, the plaintiff proposes to present in this matter today.

MR. HANKINS: Your Honor, concerning the evidentiary presentation, I would ask the Court to consider the documents that I filed with the pleadings, the initial pleading, supplement, and then I filed a second supplement this morning. I would also ask the Court to consider some of the documents -- there are many of them. Do you want me to go through a list of them? Or I was going to have Ms. -- with the Court's permission, invite Ms. McCalmont to make an evidentiary presentation and we have copies of the very numerous documents that we have.

THE COURT: Well --

MR. HANKINS: I mean, there are affidavits. There are -- from veterinarians. There's an affidavit from Mr. Mullin that the Court has reviewed. There are the -- some of the other pleadings. It's just there's quite a bit of it.

THE COURT: Tell me just a bit more about your contemplated presentation by counsel for the amici.

MR. HANKINS: I believe she can outline for the Court the -- just in summary form the specific issues in the civil rights case. Deliberate indifference, the Eighth Amendment violation, and then precisely the protocols in place in Oklahoma that are deficient and violate those -- violate the Constitution and the federal statute.

THE COURT: And how long does this presentation take?

MR. HANKINS: I believe it will be about 30 minutes.

THE COURT: Mr. Draper, it's my inclination to receive that as a proffer, subject to any commentary after it's presented on behalf of the defendants, which would in any particular respects take issue with that proffer. What says the state as to that procedure?

MR. DRAPER: I'm sorry, Your Honor, I'm not sure I understood your last question.

THE COURT: Well, Ms. McCalmont is here as counsel for amici. She is not presented as a witness. The evidentiary rules to be applied in this proceeding are to some degree a bit more relaxed than they would be in a normal proceeding,

particularly one with a jury in the box. But in fairness, I don't believe that I should permit Ms. McCalmont's presentation to rise to any higher dignity than that of a proffer. And by that I mean that I am inclined to receive it for whatever facial value it might have, subject to any critique the state may have as to any particular portions of it, which the state simply finds to be factually erroneous, which would substantially undercut the degree to which I would rely on it in those respects.

MR. DRAPER: Well, Your Honor, I guess that due to the nature of this case, we have a pending execution date for six o'clock p.m., I'm concerned about viewing a discussion from Ms. McCalmont for half an hour when I believe that the materials provided to Your Honor by plaintiff as attachments in this case will basically -- I guess I'm saying that I believe Ms. McCalmont's presentation will be cumulative of those materials. Your Honor has had an opportunity to look at those materials.

THE COURT: I have.

MR. DRAPER: And I would ask that Your Honor make his decision based on that as soon as possible so that whatever necessary action needs to happen can happen today.

THE COURT: Okay.

MR. DRAPER: Thank you, Your Honor.

THE COURT: Well, Mr. Draper, not so fast. That

suggestion is not without appeal. May I assume correctly that you don't take issue with the matters set forth in Mr. Mullin's affidavit?

MR. DRAPER: No, Your Honor.

THE COURT: I may not assume that?

MR. DRAPER: No, I do not take issue with that, Your Honor. Sorry.

THE COURT: Okay. Now, how does the protocol for the lethal injection scheduled to take place five hours and ten minutes from now square with the protocol set forth in paragraph 13 of Mr. Mullin's affidavit?

MR. DRAPER: My understanding that's the same protocol being used. I'm informed, Your Honor, from a representative of the Department of Corrections that the protocol is what is found on the website. That is the protocol that will be followed tonight, the one that's posted, and I believe that's already before Your Honor as one of the attachments from plaintiff.

THE COURT: So that's a three-step as opposed to a six-step injection procedure?

MR. DRAPER: May I have one moment, Your Honor?

THE COURT: You surely may.

MR. DRAPER: I apologize for the delay, Your Honor. I've been informed that Mr. Mullin's affidavit is -- it is the correct protocol and it does comport with the protocol that's

listed on the website. It's the administration of the three drugs listed repeated one time. So two applications of each chemical with saline washes in between each application.

THE COURT: Is the plaintiff's counsel in a position to gainsay that representation to the Court?

MR. HANKINS: Your Honor, can Ms. McCalmont address that issue?

THE COURT: On behalf of the amici you're welcome to.

MS. McCALMONT: Thank you, Your Honor. I apologize. I don't understand Your Honor's question, if we can gainsay the --

THE COURT: Well, I should perhaps say are plaintiff's counsel in a position to dispute that representation to the Court?

MS. McCALMONT: No.

THE COURT: Okay. Thank you.

MS. McCALMONT: However, I would just clarify, Your Honor, that Warden Mullin's application is -- or affidavit is the affidavit that forms the basis of the complaint and the allegations of multiple uses of IV lines and unnecessary repetition of drugs and drug amounts are -- Warden Mullin's affidavit is the source of those allegations, so it is the very matter in issue.

THE COURT: Thank you. Mr. Hankins, you heard my dialogue with Mr. Draper on the question of whether I should do

anything other than restrain the use of the challenged protocol. My concern being that the Court perhaps ought to be very wary about granting relief against execution as such, lest it grant more relief than that which is requested in the complaint. I need to hear from you as to whether there's any reason that the Court should grant relief beyond restraint of the use of the challenged protocol.

MR. HANKINS: That's correct, Your Honor. We're asking to -- for an injunction from the Court to enjoin the execution under the specific protocol contained in the affidavit, not to invalidate the statute that authorizes lethal injection as a method of execution. We have no constitutional objection in the abstract to the lethal injection as a method of execution in this state and do not ask the Court to hold that the statute violates the Eighth Amendment or the Fourteenth Amendment.

THE COURT: You may not have understood my question. Does the plaintiff seek an order restraining his execution today regardless of the means by which that is to be accomplished?

MR. HANKINS: Not necessarily, Your Honor. The plaintiff would not object if there could be medical professionals and qualified personnel to be present during the execution with authority to either stop it or intervene concerning the administration of the drugs. If that could be

accomplished --

THE COURT: Well, that's a cluster of issues that has been involved in some other cases around the country, which is not really a matter that the Court is in a position to address in any meaningful way today. Because that could be regarded as a -- albeit a back door approach, a back door approach to a frontal attack on lethal injection per se, and that's not an attractive approach for a grant of provisional relief today, but I think I understand your position.

Mr. Draper, if I take the record before the Court, that's presently before the Court, in which you have invited the Court to take as the factual record in lieu of the proposed presentation on behalf of Ms. McCalmont, I want to hear from you as -- and again, aside from the Nelson v. Campbell considerations, I need to hear from the state as to the reasons, if any, for which the Court should not regard the issues presented on their merits as being so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation either within the confines of this case or taking into account the other cases in other jurisdictions which have indeed regarded these matters as fair ground for litigation. I need to hear from you on that point.

MR. DRAPER: Well, Your Honor, I think as far as other cases go across the country, there have been cases where stays have been entered in similar issues and cases where

executions have been allowed to go forward. I don't think there's any consensus. I don't think that the fact that other courts have chosen to make a stay is necessarily any more persuasive than the courts have chosen not to grant stays and have allowed executions to go forward.

As far as -- I sort of lost my train of thought, Your Honor. I'm sorry.

THE COURT: Wait until you're 58 years old.

MR. DRAPER: I was curious what your overarching question was again. If you could refresh me, please.

THE COURT: My overarching question is this. Aside from the considerations quite emphatically articulated by the Supreme Court in Nelson v. Campbell, what would you propose to the Court as your reasons, if any, for which at base I should not regard the issues presented by the plaintiff in this case as being fair ground for litigation within the meaning of the relaxed provisional relief standard to which I have referred several times today?

MR. DRAPER: Well, I believe that -- first off, Your Honor, I have a couple of exhibits that I would like to offer that would go directly to a couple of the issues that are brought up in the materials that have been filed with you.

THE COURT: That's --

MR. DRAPER: If I may approach.

THE COURT: That's certainly fair. If you'll give

those to the clerk, please.

MR. DRAPER: And, Your Honor, I have attached as -- or presented to you as Exhibit 1 a case, In re Williams, from the Sixth Circuit which tends to discredit the doctor, Dr. Heath, whose affidavit has been presented to this Court and I've highlighted a portion on page 814 which is a concurring opinion by Chief Judge Suhrheinrich, I think is how you say it, where he quotes an affidavit presented to a Ohio court by Dr. Heath wherein Dr. Heath says, in essence, if Ohio would only do it the way Oklahoma does it, it would be okay.

And I suggest that that calls into question Dr. Heath's veracity in front of the many courts in which he has appeared and suggests that his purpose is really to manipulate and to avoid death sentences for individuals rather than to present a coherent and standard of medical practice as far as he's concerned. Of course, the state does not suggest that an execution is a medical practice. It's an execution.

The second thing, as Exhibit Number 2, is a disclaimer from the American Veterinary Medical Association. That disclaimer is now attached to the front of their report on euthanasia from the year 2000. And that disclaimer has been attached because the American Veterinary Medical Association has been so concerned that death penalty opponents have used that -- used their report in a way which is not accurate in a manner to try to avoid death sentences for people.

That disclaimer, I had to pull that off the Internet today, Your Honor. It can be found at WWW.avma.org\issues\NA_welfare\euthanasia.pdf. And that has been attached by that association to their report to try to stem the use of their report to apply the report to executions in the United States. They say that that report really is only applicable to euthanasia in animals.

THE COURT: Thank you. Mr. Hankins, bearing in mind the lenience with which I have enabled you to make your record and bearing in mind also the less than stringent approach to evidentiary matters commonly applied in proceedings like this one, does the plaintiff have any objection to the state's offer of these two exhibits?

MR. HANKINS: No, Your Honor.

THE COURT: Very well. They'll be received as Defendant's Exhibits 1 and 2.

Anything further on this point, Mr. Draper?

MR. DRAPER: No, Your Honor. Thank you.

THE COURT: Does either side have anything further to present aside from the suggestion of the presentation by Ms. McCalmont before the Court rules on the pending motion?

MR. HANKINS: Yes, Your Honor.

THE COURT: What would you have to present besides Ms. McCalmont's presentation?

MR. HANKINS: Well, direct rebuttal to the

introduction of the exhibits.

THE COURT: Okay. I'll hear you on that.

MR. HANKINS: May Ms. McCalmont present --

THE COURT: I'll hear from the amici on that.

MS. McCALMONT: Thank you, Your Honor. Separate and apart from any presentation which discusses the likelihood of success on the merits of the lethal injection complaint filed on behalf of Plaintiffs Anderson and Taylor, I would like to briefly address the two exhibits that the defendants have raised.

First, I would draw the Court's attention to the case In re Williams in which counsel has mentioned Dr. Heath referred with some approval to the Oklahoma statute. I would draw the Court's attention to the citation to the continuous intravenous administration of an ultra short-acting barbiturate. That is in fact Oklahoma statute. That is not in fact how Oklahoma actually administers its lethal injection drugs. And the distinction between a continuous administration of an ultra short-acting barbiturate and a bolus dose is quite --

THE COURT: A what dose?

MS. McCALMONT: A bolus dose. A pill or a slug through a syringe as opposed to continuous IV administration is quite significant with a drug like thiopental, which is both ultra short-acting and capable of being ultra short in duration if it's not administered correctly.

And Dr. Heath adequately addresses that in the affidavit you have before you and notes the distinction between a continuous administration which he cites with approval in this legal opinion versus the method of execution that Oklahoma currently employs in Warden Mullins' affidavit.

Second, I'd like to address the question of the applicability of the AVMA report on euthanasia. If I may, I would like to provide the Court with a copy of the full report. May I approach?

THE COURT: Very well. This would be Plaintiff's Exhibit 1?

MS. McCALMONT: Your Honor, I put it as an amici exhibit --

THE COURT: Amici Exhibit 1. Bearing in mind the same considerations, Mr. Draper, and bearing in mind also that you have provided the Court with an addendum to this report, do the defendants have any objection to the admission of Amici Exhibit 1?

MR. DRAPER: No objection, Your Honor.

THE COURT: It is received. Go ahead.

MS. McCALMONT: Thank you. The American Veterinary Medical Association has recently issued the statement that counsel referred to expressing concern in how lawyers are using their euthanasia standards to analogize the lethal injection. There are some considerations in other jurisdictions that might

make the AVMA standards inapplicable, but those do not apply in Oklahoma.

The specific prohibition that we refer to in Oklahoma in our complaint is on page 680 of the AVMA protocol, which is the prohibition against a combination of pentobarbital and a neuromuscular blocking agent as not being an acceptable combination of euthanasia agents.

The AVMA raises this prohibition because of their concern in the application of a drug called T61, which is also referenced on this page on the right-hand column of this page. That was a euthanasia agent that veterinary surgeons attempted to use in the United States for a period of time which combined a barbiturate anesthetic and a neuromuscular blocking agent in the same syringe.

They found that they were concerned about their ability to control the rate and timing of the onset of those separate drugs. When they're combined in the same syringe, the concern is the neuromuscular blocker agent will start to paralyze the body and stop voluntary respirations before the barbiturate anesthetic actually takes effect and renders the patient unconscious.

When you have a single line method of drug delivery and you have a sequential administration of a barbiturate anesthetic and then followed by a neuromuscular blocking agent, this concern is not as prominent. But in Oklahoma where you

use a two-line method of drug administration, where the thiopental moves in one arm and the neuromuscular blocking agent moves in another, it has the effect in the body of combining those drugs at the same time in the body. Regardless of the sequential administration in opposite arms, it has the potential to impair the rate and timing of onset of those drugs, just as the AVMA had prohibited in this standard.

And possibly more importantly, on page 681, the AVMA expressly prohibits death by potassium chloride without the assessment, the manual assessment of a surgical plane of anesthesia prior to the administration of --

THE COURT: Manual assessment of what?

MS. McCALMONT: Of the surgical plane of anesthesia prior to the administration of the killing agent potassium chloride. In lethal injections in the United States I think it has been well proven in the Morales litigation in California as well as elsewhere that potassium chloride is the killing agent. That evidence, I think, is also corroborated in Oklahoma executions where time of death is always noted after the administration of potassium chloride.

Since potassium chloride is the killing agent, it directly contravenes the AVMA policy here that there is no assessment of a surgical plane of anesthesia before proceeding with the extraordinarily painful application of potassium chloride.

THE COURT: Thank you.

MS. McCALMONT: So in all respects the AVMA is, in fact, the most appropriate standard in addition to the standards offered by the American Society of Anesthesiologists, which also say prior to the use of any neuromuscular blocking agent, one must have the assessment by clinical modalities of the plane of anesthesia in which the patient is placed.

And, importantly, the AVMA also has a caveat on their website which addresses the question of what you should do if you are interested in applying the AVMA standards in any context outside the AVMA euthanasia. And they say get yourself a veterinary anesthesiologist and ask his opinion about the applicability of these standards to your situation. And, of course, plaintiffs have done that, because they have the affidavit of veterinary anesthesiologist Ken Cannon before the Court, which talks about the applicability of these standards to the lethal injection context and the requirement of careful assessment of the depth of anesthesia prior to proceeding with death by potassium chloride.

THE COURT: Thank you. Again, bearing in mind that the plaintiff has proposed the presentation of the Power Point presentation by Ms. McCalmont, and aside from that, does either party have anything further to present before the Court rules on the motion?

MR. DRAPER: No, Your Honor.

MR. HANKINS: No, Your Honor.

THE COURT: It will not be necessary to receive the Power Point presentation proposed by the plaintiff. The plaintiff in this case has alleged that his injury will consist of conscious suffering and pain by the condemned inmate, which he asserts he will suffer during his execution if the State of Oklahoma proceeds with its execution by the proposed lethal injection protocol.

He alleges that the protocol does not, in fact, result in a quick, painless death, but rather implementation of the protocol carries a very high risk that he will be paralyzed during the process and suffer excruciating pain while being unable to communicate or move.

He further asserts that there is, in fact, a significant risk of agonizing and prolonged pain during the execution process which will deprive him of his rights under the Fifth, Eighth, and Fourteenth Amendments to the Constitution to be free from cruel and unusual punishment.

The Court need not elaborate at great length in this case on the fact that when we talk about irreparable injury, although the Court of Appeals has addressed the question of irreparable injury in its May 30th opinion and has commented on its approach to that issue, in this case now that we do have a Section 1983 action pending and in this case now that we do have an execution set to occur less than six hours from now, the Court is led to the conclusion that we do have irreparable

injury in prospect consisting of an injury occurring during the execution of the plaintiff.

The Court therefore concludes that the first requirement for provisional relief, irreparable injury has been established and that this factor does weigh in favor of granting temporary relief.

I've already alluded to the nature of the injury which the plaintiff asserts he will suffer. Balanced against that alleged physical injury is the injury which would be incurred by the state as a result of the granting of temporary relief.

The primary injury which the state will suffer in the event a restraining order is entered is a delay in the execution of the plaintiff's sentence and the burdens and costs associated with that delay.

On the other hand, if the Court ultimately determines this action in favor of the plaintiff, then the state's interest in the constitutional execution of its condemned criminals is served and that also is an important state interest.

For these reasons, the Court concludes that in these circumstances the threatened injury to the plaintiff outweighs the damage which a grant of temporary relief might cause to the state so that the second requirement for temporary injunctive relief is met.

The public does have an interest -- turning now to the third consideration, which the Court has previously

articulated. The public does have an interest in the expeditious carrying out of sentences of execution, and that is indeed a weighty interest as has been articulated very well by counsel for the defendants as well as the Supreme Court and the Tenth Circuit Court of Appeals.

The public also has an interest in issues such as those raised in this case being raised in a timely manner rather than on the eve of execution, as is the case here, so that the issues may be resolved in as orderly and as considered a manner as is possible.

As recognized by the Tenth Circuit Court of Appeals in its May 30th amended order denying stay, the state does very much have an interest in the timely carrying out of its final criminal judgments and the public has an interest in a criminal justice system which works as prescribed by its elected representatives without manipulative disruptions caused by eleventh hour claims which could have been asserted earlier. These general public interests are indeed substantial.

Furthermore, I am very mindful of the fact that if injunctive relief is granted the family of the victim of Mr. Boltz's crime will suffer the inevitable trauma of a last-minute delayed execution. Those interests are so substantial that as previously noted the Supreme Court has stated that the district court "must consider the extent to which the inmate has delayed unnecessarily in bringing the claim." That's from

page 649 and 650 of the Nelson v. Campbell opinion.

The public also has an interest, however, in the constitutional execution of its condemned criminals, as I have already said. In this case, the plaintiff has advanced several arguments as to why this action is not a last-minute manipulation, as I have previously described.

Whether or not the Court finds this action to involve last-minute manipulation, I am indeed influenced by the public's considerable interest in the constitutionality of -- or the constitutional administration of its execution protocols and the public's interest in expeditious administration of capital punishment as has been upheld in this case in particular as well as in general under the Oklahoma statutory scheme for the administration of capital punishment.

I do find and conclude that the third requirement for temporary relief is met because the grant of temporary relief, and the emphasis here is on temporary for reasons I will describe in a moment, is not adverse to the public interest.

Having found that the plaintiff has satisfied the first three requirements for temporary relief, the Court does apply a more lenient standard with regard to the fourth requirement, as has previously been discussed. The application of that standard, however, and the balancing which must nevertheless take place in applying that standard is most assuredly tempered by the concerns in the passage on pages 649 and 650 of Nelson

v. Campbell. That passage certainly does articulate very weighty concerns which do weigh heavily on the Court's consideration of the matter.

Applying the more lenient Tenth Circuit standard on its face, it is the Court's conclusion that the plaintiff need only show that the issues are so serious, substantial, difficult, and doubtful as to make them fair ground for litigation. Issues involving protocols for execution are to say no more extremely serious. It is my conclusion that we do have here substantial issues which are fair ground for litigation. They are difficult and doubtful, as evidenced by the differences of opinion expressed by other courts, state and federal, in decisions which have recently considered those issues.

And in that respect, I would refer counsel to some more recent juris prudence from the Sixth Circuit in Alley v. Little, 2006 Westlaw 1313365, and the dissent to the en banc hearing in that case at 2006 Westlaw 1320433.

Having considered all the matters presented to the Court and being aware in a general manner of the currently divided views of other courts, state and federal, regarding the merit of claims similar to those made by the plaintiff in this action, I do conclude that the allegations made in this action are fair ground for litigation.

I do conclude that the fourth requirement for temporary injunctive relief is met and I do so bearing in mind, as I have

said, that weighing heavily in the balance are the equitable considerations articulated by the Supreme Court in Nelson v. Campbell. And I would emphasize also that I regard the application of and the controlling effect of the Nelson v. Campbell considerations as being a close question.

I'm also influenced to some degree by the pendency of the Hill v. McDonough case in the U.S. Supreme Court which may lend considerable clarity, at least in some respects, to the issues now before this Court in this case and perhaps also in the Anderson case.

For that reason, bearing in mind that the only request before the Court today that the Court is considering is a request for a temporary restraining order, the defendants are temporarily restrained pending the further order of the Court from proceeding with the execution of the plaintiff. This is only a temporary restraining order. The emphasis is on the word "temporary."

The matter will be set for a hearing on a preliminary injunction on June 28, 2006, at nine in the morning. That's June 28, 2006, at nine in the morning.

This temporary restraining order effective only until that date will afford the parties an opportunity for at least a minimally orderly presentation of and resolution by the Court of the issues involved in this case.

At the June 28, 2006, hearing on the preliminary

injunction, I will hear any additional evidence and arguments the parties may wish to present in support of and in opposition to provisional relief and the parties can certainly assume that I will recall the matters presented today.

Secondly, and I caution all counsel to bear this carefully in mind, I will hear arguments as to whether the Court, if it continues provisional relief in effect at all, should grant any provisional relief other than the restraint of the use of the challenged protocol involving the sequential injection of sodium thiopental, vecuronium bromide, and potassium chloride. And in this respect, it is to be carefully noted that the plaintiff does not contest his execution in this action.

It seems to the Court that it is quite possible that continuing restraint of the execution, which the Court does today, as opposed to temporary restraint of execution using the challenged protocol, would amount to a grant of provisional relief in excess of that which plaintiff could obtain by way of the final judgment in this case. And that will be a matter to be carefully considered at the hearing on June 28th.

The conclusion I reach today and the order that I enter today do not constitute a resolution of plaintiff's claims on their legal or factual merits and should certainly not be taken by anyone as an indication as to what the Court's ultimate disposition of the plaintiff's claims may be.

A major factor in the Court's ruling on the motion for

temporary restraining order is the relaxed standard for provisional relief that I have discussed and have concluded is applicable at this point in these proceedings, albeit tempered by the considerations articulated by the Supreme Court in Nelson v. Campbell.

The plaintiff asserts in this case that he has a constitutional right to be spared a brief period of pain which he asserts is unavoidable -- or which he asserts is avoidable, I should say, and which he asserts under the Eighth Amendment must not be inflicted.

Although it is legally irrelevant to today's proceedings, the irony of plaintiff's claim in this case is not lost on this Court. The opinion of the Oklahoma Court of Criminal Appeals in this case indicates that at the plaintiff's murder trial, the evidence established through the testimony of Medical Examiner Fred Jordan that, and I quote, "The autopsy of Doug Kirby revealed a total of 11 wounds including eight stab wounds to the neck, chest, and abdomen and three cutting wounds to the neck. One of the wounds to the neck was so deep that it had cut into the spinal column. The carotid arteries on both sides of the neck were cut in half and the major arteries in the heart were also cut."

The Court's grant of relief in this case today will serve only the limited but important purpose of permitting the orderly resolution of the claim asserted by the plaintiff.

The Court will enter a written order as soon as is practicable memorializing the essential features of the Court's ruling. I urge the parties also to obtain a transcript as soon as that can reasonably be obtained from the reporter.

The hearing on June 28th will certainly be aided by the Court's receipt of additional briefing. And the plaintiff is granted until the 14th of June within which to file any brief the plaintiff may choose to file in support of his request for preliminary injunction to which the defendants may respond not later than June 26th.

Is there anything further to come before the Court this afternoon in this matter?

MR. DRAPER: Your Honor, I'd just give the Court oral notice that we are going to file a notice of appeal almost immediately and would just ask the Court to get your order filed as soon as possible, if that's possible.

THE COURT: We'll certainly make every effort to do that. Anything further this afternoon from the plaintiff?

MR. HANKINS: Your Honor, since I am pro bono, I would ask for funds from the Court to -- or an order from the Court to obtain a copy of the transcript of today's proceedings. Otherwise, I'll just pay for it.

THE COURT: Pardon me?

MR. HANKINS: I said, otherwise, I'll just pay for it.

THE COURT: Well, I don't want to consider that just off the cuff. A transcript will be made available. You can make arrangements for payment with the reporter and then I'll consider a motion for reimbursement filed at the appropriate time. Court will be in recess.

(COURT ADJOURNED.)

REPORTER'S CERTIFICATE

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF PROCEEDINGS:

Tracy Washbourne, RMR, CRR
United States Court Reporter
Western District of Oklahoma